Telemessaging. The FCC seeks comments on its tentative conclusion "that BOC provision of telemessaging on an interLATA basis is subject to the §272(a) separate affiliate requirements, in addition to the §260 safeguards, which apply to all incumbent LECs, including the BOCs." *NPRM*, para. 54. This tentative conclusion is wrong. The §260 definition of "telemessaging service" includes, among other services, "voice mail and voice storage and retrieval services." These services also fit the general definition of "information services" in §3(20), and the MFJ Court treated voice mail as an information service. Under the 1996 Act, as compared with the MFJ, however, "telemessaging" is a distinct category of service, which includes functions such as live operator services that are not information services, and which has separate rules from those for "interLATA information services." As the more specific provision for telemessaging, §260 is the provision that must govern these services, not §272. Similarly, §271(g)(4) is a general provision for various incidental information service applications that permit " a customer that is located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another LATA." Again, this section applies to these applications generally, but the specific provisions in §260 govern telemessaging services.

Distinct treatment for telemessaging services, allowing BOC integration of interLATA applications, is logical and consistent with the public interest. The FCC's *Computer III* policy of encouraging BOC integration of enhanced services has been a huge public interest success, and it is with voice mail services that this success has first come to fruition. The FCC began its integration policy specifically because voice mail was not being provided to the mass

market.[19] Voice mail was the first full-scale enhanced service provided by BOCs.[20] With integration, the BOCs are providing voice mail to millions of customers.[21] Moreover, in all the years that the BOCs have provided voice mail under nonstructural safeguards, we know of no formal FCC complaints by ESPs concerning the BOCs' provision of this or other enhanced services or of any discrimination revealed by the BOCs' nondiscrimination reports filed with the FCC.[22] It is understandable that, in the face of this history, Congress would treat telemessaging differently by ensuring against cross subsidy and discrimination in §260, without reducing the efficiency benefits of integration by requiring structural separation for interLATA telemessaging services.

IV. Structural Separation Requirements Of §272 (¶¶ 55-64)

A. *The Implementation Of §272 Requirements Should Not Differ For The Various Activities Covered By §272*

In the *NPRM*, the Commission states the five structural and transactional requirements imposed on the required separate affiliate by §272(b). *NPRM*, para. 55. It is important to note at the outset of a discussion of those requirements that they apply only with respect to the relationship between the required separate affiliate and the BOC, as defined in the 1996 Act. The requirements do not, by the explicit language of the 1996 Act, apply to the relationship between

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[19] In 1986, the FCC found that structural separation requirements had "prevented consumers, and particularly small-business and residential consumers," from being offered network-based voice messaging services. *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, CC Docket 85-229, *Phase I, Report and Order*, 104 FCC 2d 958, para. 90 (1986) ("*CI-III Phase I Report and Order*").

[20] *See, e.g., Pacific Bell and Nevada Bell Plan for the Provision of Voice Mail Services*, 3 FCC Rcd 1095 (1988). BOCs provided some protocol conversions prior to voice mail, but they were ancillary to other services.

[21] *See, e.g., Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20, 10 FCC Rcd 8360, para. 37 (1995) ("*CI-III Further Remand NPRM*").

[22] *See id.* at para. 29.

the required separate affiliate and any other entity, *e.g.*, a holding company or other affiliate of the BOC. The definition of BOC in §3(4) excludes affiliates of the BOCs. Congress showed in §274 that it understood this and when it wanted to extend safeguards beyond the BOC/separate affiliate relationship, it did so by expanding the definition of BOC to include subsidiaries of the BOC.[23]

The Commission seeks comment on "whether the 1996 Act permits us to, and if so, whether we should, interpret or apply any of the §272(b) requirements differently" with respect to the different activities (*i.e.*, interLATA telecommunications, manufacturing, and interLATA information services) covered by that section of the 1996 Act. *NPRM*, para. 56. The 1996 Act does not permit the Commission to apply the safeguards and requirements of §272(b) differently, and even if it did, the Commission should not create differences.

Section 272 is quite clear. Subsection (a) creates the requirement for one or more separate affiliates, specifies the activities for which such an affiliate is or affiliates are required, and requires compliance with subsection (b). Subsection (b) begins by saying "The separate affiliate required by the section --" and then enumerates the requirements. It does not say "the separate affiliate providing interLATA telecommunications service" or "the separate affiliate engaged in manufacturing" or "the separate affiliate providing interLATA information service." Congress could have, and would have, specified different safeguards and requirements for the different activities if it had intended there to be different safeguards and requirements, similar to the way it created different safeguards and requirements for electronic publishing separated

[23] 47 U.S.C. §274(i)(10).

affiliates and joint ventures in §274(b).[24] Furthermore, if Congress had intended there to be requirements beyond those explicitly stated for one or more of the activities covered by §272, it would have specified them, as it specified in §274 for electronic publishing requirements beyond those stated in §272 .[25] Finally, if Congress had wanted the Commission to create additional or different rules, it would have directed the Commission to do so, as it did in §§273(g) and 276(b). The 1996 Act does not give the Commission the authority to create differences in the application of the §272(b) requirements.

Nor is there any reason for the Commission to seek to create such differences, assuming *arguendo* that it could do so. The types of concerns that led to the creation of safeguards such as those in §272(b) -- the possibility of cross-subsidy and discrimination by the BOC -- exist, to the extent they exist at all, regardless of the activity involved. Consequently, those concerns should be addressed in a like manner for each of the covered activities. The requirements and safeguards specified in §272(b) are adequate to address those concerns -- there is no need to add to them or create differences. Furthermore, the creation of such differences would unnecessarily increase the complexity and burden on the BOCs to comply with §272(b), and on the Commission to enforce it. This complication and increased burden would be heightened if a BOC decided to conduct all covered activities from a single separate affiliate. The goal should be to simplify, not complicate, the implementation and enforcement of this section and all of the 1996 Act.

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[24] See §§274(b)(5) and (7), which impose certain safeguards on electronic publishing separated affiliates, but not on electronic publishing joint ventures.

[25] See, e.g., §§274(b)(4)(5)(B), (6), and (7).

B. The Independent Operation Provision Does Not Require The Imposition Of Additional Requirements

In paragraphs 57 through 60 of the *NPRM*, the Commission discusses the requirement of §272(b)(1) that the separate affiliate "operate independently" from the BOC, and tentatively concludes that as it is a separately enumerated subsection it imposes requirements beyond those listed in §§272(b)(2)-(5). Further, the Commission discusses certain separation requirements imposed in other proceedings, and seeks comment on whether the requirement to operate independently imposes some or all of those additional requirements.

The Commission need not adopt additional requirements, beyond those enumerated in §272(b), to give affect to the operate independently requirement. Rather, that requirement should be viewed as providing a "gloss" on the other requirements, to indicate the purpose of those requirements and provide guidance in implementing them. Congress knew how to include any requirements that it found to be necessary,[26] and it did not include any additional requirements in §272(b). The situation here is not the same as in either *Computer II* or the *Competitive Carrier* proceeding. Here, Congress has examined what is needed to mitigate the cross-subsidy and discrimination concerns, and has specified the requirements and safeguards it found to be appropriate. In both *Computer II* and the *Competitive Carrier* proceedings the Commission was establishing rules to deal with specific situations where Congress had not specified safeguards and requirements. Since Congress here has specified safeguards and requirements and has not invited or directed the Commission to add to them, the Commission should refrain from doing so.

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[26] See §274(b), which includes the same requirements as §272(b) plus several others.

The Commission also requests comment on the relevance of the "operated independently" requirement in §274(b) in construing §272(b)(1). *NPRM*, para. 60. The similarity of language between §§272(b) and 274(b) does not mean that all of the requirements of §274(b) should be read into §272(b). The more reasonable interpretation is that Congress intended the similar requirements in §§272 and 274 (e.g., §272(b)(2)-(5) and §274(b)(1)-(3) and (5)(a)) to be interpreted in the same way, and wanted to impose additional requirements for electronic publishing. The Commission should interpret the similar requirements to mean the same thing, and leave the additional requirements to §274, where Congress put them. This is the most reasonable interpretation, and will be easiest for the BOCs and the Commission to follow in implementing and enforcing §§272 and 274.

C. *The Separate Officers, Directors, And Employees Requirement Does Not Prevent Sharing Of Services*

Section 272(b)(3) requires the separate affiliate to have separate officers, directors, and employees from the BOC. From this simple, straightforward requirement, the Commission reaches a tentative conclusion, related not to sharing of employees but to sharing of services, that simply makes no sense. The Commission tentatively concludes that there can be no sharing of "in-house functions such as operating, installation, and maintenance personnel, including the sharing of the administrative services that are permitted" to be shared under *Computer II*, and seeks comment on whether the sharing of "outside services" should also be prohibited. *NPRM*, para. 62.

The Commission does not define "in-house" or "outside". The only definitions that make sense in the context used by the Commission is that "in-house" means within the BOC

or separate affiliate and "outside" means elsewhere, including in a holding company or other affiliate of the BOC and separate affiliate.

There is no basis for the Commission's tentative conclusion regarding the sharing of administrative services. Section 272(b)(3) prohibits sharing of personnel, not sharing of services. As the Commission recognizes, under the rules promulgated as a result of *Computer II*, separate subsidiaries were required to operate independently in the provision of enhanced services and customer premises equipment and to have separate officers and operating, marketing, installation and maintenance employees.[27] Similar separation requirements also govern BOC provision of cellular service.[28] To use the Commission's language, "*Computer II* mandated 'maximum separation'". *NPRM*, para. 58. That is certainly broader than the separation contemplated by the 1996 Act. But even under *Computer II* the BOC and separate subsidiaries were permitted to share administrative services *i.e.*, the BOC was permitted to provide certain administrative services to the separate subsidiaries.[29]

The Commission does not explain why it has concluded that such sharing was permissible under *Computer II* but is not permissible under the 1996 Act. Sharing of administrative services does not mean sharing of employees, it means that one company or the other (*i.e.*, the BOC or the separate affiliate) is providing services to the other. This provision of services would be subject to the other §272(b) requirements and would not result in any improper cross-subsidies or discrimination. Congress was not operating in a vacuum when it created §272(b). It was fully aware of the *Computer II* rules, which permitted shared services, and would

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[27] See 47 C.F.R. §64.702(c).
[28] See 47 C.F.R. §22.903(b).
[29] See *Second Computer Inquiry*, 77 F.C.C.2d 384, para. 255.

have imposed a restriction on shared services in §272(b) if it had found such a restriction necessary. It did not do so, and neither should the Commission.

In addition to the sharing of services described above, the BOC and separate affiliate are permitted to each obtain similar services provided on a centralized basis by their holding company or another affiliate, or provided by an unaffiliated third party. The §272(b) structural separation and transactional requirements apply between the BOC and separate affiliates, not between either of them and other affiliates, and even that separation is not absolute. If Congress had intended an absolute separation, it would have not allowed common ownership. It is in the public interest for a corporation, such as a holding company, to efficiently perform, or have performed, for all parts of the corporation, the types of administrative services that all corporations must perform, or have performed. This includes, but is not limited to, accounting, auditing, legal, finance, human resources and the like. Costs of providing these services by one organization to both the BOC and the separate affiliate can be attributed to the user of the service. The Commission's accounting safeguards will prevent any improper cross-subsidy or discrimination. Our competitors will obtain service on a centralized basis. We will be disadvantaged if we are prevented from doing so. Costs of our competitive endeavors will increase and cause prices to consumers to go up.

D. No Additional Non-Accounting Safeguards Are Necessary To Implement The Arm's Length Requirement of §272(b)(5)

The Commission seeks comment on whether any non-accounting safeguards are necessary to implement the §272(b)(5) requirement of arm's length transactions. *NPRM*, para. 64. The Commission notes that it will address implementation issues for this requirement in its accounting safeguards *NPRM* (CC Docket No. 96-150). That proceeding is the appropriate

place to consider this requirement. There is no need to create additional non-accounting safeguards that were not contemplated or required by Congress.

V. Nondiscrimination Safeguards (¶¶ 65-89) -- The Commission Must Apply The Nondiscrimination Requirements The Way Congress Established Them

A. We Agree That The BOCs Cannot Escape Or Diminish The Nondiscrimination Requirements, But Neither Can The Commission Enlarge Them

Transfer of network capabilities. The FCC tentatively concludes "that any transfer by a BOC of existing network capabilities of its local exchange entity to its affiliates is prohibited by §272(a)...." The Commission's alternative proposal is that, if a BOC transfers its existing network capabilities to a competitive affiliate, the affiliate would qualify as a successor or assign of the BOC, thus subjecting it to the nondiscrimination requirements of §272. The Commission's concern is that "a BOC might have the incentive and ability to transfer network capabilities of its local exchange company to the operations of its competitive affiliates to avoid the nondiscriminatory provision of these capabilities as required by §§272(c)(1) and (e)." *NPRM*, para. 70.

Although we fully agree that BOCs cannot escape nondiscrimination requirements by transferring their network operations to an affiliate, the Commission should clarify both its tentative conclusion and alternative proposal. First, the Commission should clarify that a prohibition on transfers would relate only to transfers to §272(a) required affiliates. A BOC's transfer of its existing network operations which are used to provide telephone exchange service, to a required affiliate would violate the §272(a) requirement that a BOC provide the specified activities (e.g., interLATA services) only in an affiliate that is separate from "any operating

company entity that is subject to the requirements of §251(c)."[30] There should be no prohibition, however, on a BOC's flexibility to transfer its network operations to any non-required affiliate, since that would not conflict with the statute. Consistent with the Commission's alternative proposal, we agree that the transferee affiliate would become the successor and assign to the BOC, subject to the following further clarifications.

Second, the FCC should clarify that it is referring to actual transfers of network facilities that would leave the BOC without the continued capability to perform the network functionality needed for telephone exchange service in the area. There should be no limitation on the ability of either required affiliates or other BOC affiliates to develop their own capabilities, or to purchase services, interconnection, and access from BOCs and others, like any other entity. This ability, of course, would be subject to statutory requirements. For example, the required interLATA telecommunications affiliate will be subject to nondiscrimination requirements of §202, and other common carrier provisions.

Third, only substantial transfers should affect regulatory status. In addition, transfers of public utility property not necessary or useful for utility service should not trigger any prohibitions or requirements. In assessing whether or not a transfer is substantial, the FCC should apply equitable principles used in connection with consent decrees and injunctions, under which courts consider whether an action is an attempt to evade the effects of the consent decree or injunction.[31] The Commission needs to consider whether the transfer relates to services that

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[30] Section 251(c) applies to incumbent LECs, which are defined in §251(h)(1)(A) as having "provided telephone exchange service" in the area on the date of enactment of the 1996 Act.

[31] The "successors and assigns" language in Section III of the MFJ is modeled after Federal Rule of Civil Procedure 65(d) regarding the reach of injunctions. *See* 28 U.S.C. Rule 65(d). The Commission should construe the reach of the Act to be consistent with that

the statute is trying to constrain and, if so, whether the facilities transferred are sufficient to prevent the operating company from offering the telephone exchange service to third parties. If the answer to both questions is yes, then the BOC may not make the transfer to a required affiliate, and the transfer to a non-required affiliate would subject it to the nondiscrimination requirements as a successor or assign of the operating company.

Interplay between §§272(e) and 272(c)(1). The FCC seeks comment on "whether, before sunset, the non-accounting requirements of §272(e) [requirements for BOC fulfillment of requests] are subsumed completely within the requirements of §272(c)(1) [general nondiscrimination requirements for provision or procurement of services, etc.]." *NPRM*, para. 66. Prior to sunset, the very broad and general requirements in §272(c)(1) do subsume all the specific requirements in §272(e). In the case of BOCs, Congress wanted to be very clear about what is required. Concerning the Senate Bill provision upon which §272 was based, the Conference Report explains that "[t]hese provisions are intended to reduce litigation by establishing in advance the standard to which a BOC entity that provides telephone exchange service or exchange access service must comply in providing interconnection to an unaffiliated entity." *Conference Report*, p.150.

Categories of services. The FCC asks "whether the terms of §§272(c)(1) and (e) could be construed to require a BOC to provide a requesting entity with a quality of service or functional outcome identical to that provided to its affiliate even if this would require the BOC to provide goods, facilities, services, or information to the requesting entity that are different from

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precedent. The case law under Rule 65(d) makes clear that the restrictions of an injunction inure to "successors and assigns" of the party only when the effect of a transfer would otherwise be to avoid the purpose of the injunction. *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945); *Herrlein v. Kansas*, 526 F.2d 252, 255 (7th Cir. 1975).

those provided to the BOC affiliate." *NPRM*, para. 67. These sections do not require BOCs to do this, but neither do they prohibit it. These sections prohibit "discrimination" and require provision of services at the "same terms and conditions." These are the types of requirements with which the FCC generally ensures compliance by requiring that services be offered under tariff.[32] Tariffs and traditional nondiscrimination requirements do not normally provide the differential treatment described by the Commission in its question. Normally, if the requesting entity wants something different than is provided to the BOC affiliate, the requesting entity should request something different, or provision services itself via collocation. This is not to say that the BOC must, or even can, treat all entities the same. As discussed below, treating different categories of customers differently is not proscribed discrimination. Moreover, there are times when a BOC can provide a customer a functionally equivalent outcome to what the BOC provides itself or its affiliate, without providing the exact same physical service or facilities. For instance, in *Computer III* the Commission established comparably efficient interconnection ("CEI") requirements in order to ensure nondiscriminatory treatment between the BOCs' enhanced service operations and unaffiliated ESPs, while allowing the BOCs some efficiencies of integration. These sections of the 1996 Act allow this same approach, as well as allowing parties to mutually agree on nondiscriminatory arrangements.

Information services and manufacturing. The FCC points out that §§201 and 202 are common carrier provisions that do not apply to information services and manufacturing. The FCC asks "whether other provisions of the Communications Act permit us to, and if so whether we should, place any additional nondiscrimination requirements on affiliates that engage in these activities." The FCC also asks "whether nondiscrimination provisions that are established in

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[32] *See, e.g., CI-III Further Remand NPRM*, para. 18.

other sections of the Communications Act, for example the restrictions on manufacturing affiliates in §273 or those on electronic publishing affiliates in §274, affect our treatment of other services under §§272(c)(1) and 272(e), particularly when one affiliate engages in multiple activities." *NPRM*, para. 71.

The Commission cannot place additional restrictions on these activities, but must follow what Congress has prescribed. When one BOC affiliate engages in multiple activities, for each activity the affiliate and the BOC must ensure compliance solely with the requirements that relate to that activity. For instance, common carrier requirements do not apply to information services and manufacturing because they are not common carriage. After lengthy proceedings, the FCC concluded that enhanced (or information) services are not common carrier services and that competition and public benefits would thrive by avoiding common carrier regulation of them.[33] If the FCC were to attempt to place nondiscrimination requirements on them, it would, by definition, be attempting to make them common carriage. Besides being illegal, this would make no sense and would harm the public interest. Moreover, §272(c)(1) imposes a nondiscrimination requirement only on the BOC, not on the separate affiliate providing interLATA information services. In addition, nondiscrimination provisions in other sections of the 1996 Act (e.g., §274 regarding BOC treatment of electronic publishers) cannot affect the requirements in §272. Congress knew how to set forth requirements, and if it wanted the requirements in §274 to be in §272, it would have put them there.

General nondiscrimination requirement. The FCC seeks comments on its tentative conclusion that "the prohibition against discrimination in §272(c)(1) means, at a

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[33] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket 20828, 77 FCC 2d 384 114-118 (1980).

minimum, that BOCs must treat all other entities in the same manner as they treat their affiliates, and must provide and procure goods, services, facilities and information to and from these other entities under the same terms, conditions, and rates." *NPRM*, para. 73.

Congress did not intend to impose a stricter standard for compliance with §272(c)(1) than with §202. Although in §202 Congress proscribed "unjust or unreasonable discrimination" by carriers in the provision of services, in *Computer III* the FCC has simply spoken in terms of safeguarding "against access discrimination" via "nondiscrimination" requirements rather than ensuring against "unreasonable discrimination."[34] Thus, it is understandable that Congress has simply spoken in terms of "discrimination" in §272(c)(1). Nonetheless, the FCC has always enforced these safeguards by looking at what is reasonable or unreasonable discrimination, and the FCC should apply the same approach here. An example of the FCC's existing approach is that the FCC allows BOCs to collocate their own enhanced services equipment, without requiring them to allow third parties to collocate their enhanced services equipment, so long as BOCs meet nonstructural safeguards. As the FCC now suggests, "a BOC can treat unaffiliated entities differently with respect to the activities at issue in §272(c)(1) as long as such disparate treatment is justified upon an appropriate showing of differences between the unaffiliated entities...." Moreover, the FCC has long recognized the need for distinctions even in regulating like entities. For instance, the FCC allowed the BOCs to create density zones with prices for the same interexchange access service differing depending on the zone in which the relevant end office exists.[35] The differential pricing reflects per unit cost differences inherent in providing services in areas of varying densities of service. Density zone

[34] *See, e.g., CI-III Further Remand NPRM*, para. 28.

pricing may be said to create a type of discrimination in pricing. At the same time, however, density zone pricing avoids the unreasonable discrimination that results from charging customers in high density zones more than can be justified by costs, while charging customers in low density zones less than can be justified. Similarly, the FCC should consider what is reasonable and unreasonable discrimination in applying §272.

Section 271(c)(1) also does not require that the BOC treat its own affiliates exactly the same as like entities for all activities. As discussed in Part IV above, if Congress intended an absolute separation between the BOC and its required affiliates, with identical treatment to unaffiliated entities, Congress would not have permitted common ownership of the BOC and the required affiliates. The corporation must attempt to realize economies of scope and scale by having the BOC provide administrative services for itself and affiliates, and this is consistent with Congress's and the FCC's goals to increase efficiency and other benefits of competition for consumers. In any event, the holding company is not prohibited from providing such services since §3(4)'s definition of BOC does not include the holding company.

Although not all entities and services need to be treated identically, the same safeguards should apply to all types of entities and services, and no additional safeguards are needed. If Congress had wanted additional safeguards, it would have required them.

B. Section 272 Nondiscrimination Requirements Should Be Met By Extending Preexisting Safeguards

Sufficiency of preexisting nondiscrimination requirements. The FCC describes how it has already established requirements for interconnection between LECs and IXCs and between BOCs and ESPs based on the interconnection requirements of §201 and the

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[35] *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket

nondiscrimination requirements of §202. *NPRM*, para. 69. In addition, the FCC "believe[s] that the existing *Computer III* regulatory scheme contains non-accounting safeguards that provide protection against the type of BOC behavior that §272(c)(1) seeks to curtail." *NPRM*, para. 75.

We agree. These various requirements[36] are more than sufficient to implement the §§272(c)(1) and 272(e) nondiscrimination requirements. The issues are not new. As the Commission explained to the MFJ Court in 1987:

> We already have available the regulatory mechanisms that will be needed to oversee BOC participation in this [interstate interexchange] marketplace to ensure that no harm results to the public or to competition. Many of the regulatory mechanisms already prescribed for other BOC activities or other carriers -- such as cost accounting requirements, nondiscrimination provisions, access charge guidelines, and equal access requirements -- are readily adaptable to BOC interstate interexchange offerings.[37]

Since that time, the FCC has had nine more years of experience with these mechanisms and safeguards, and its statement is even truer today. The basic principles of equal access have become well established in the technologies of the BOCs' and other companies' networks. In its most recent Trends in Telephone Service report, the FCC has noted that the BOCs have converted 99.9% of their lines to equal access, and that 98% of the nation's telephone lines, overall, have made the transition.[38] In addition, existing competitive safeguards effectively prevent discrimination. For instance, CEI requirements ensure that the interconnection that the BOC provides to unaffiliated ESPs is comparable, based on equal access

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No. 91-141, 8 FCC Rcd 7374, paras. 98-100 (1993).

[36] In addition, interconnection agreements are being established under §§251 and 252.

[37] Reply Comments of the FCC on the Report and Recommendations of the U.S. Concerning the Line of Business Restrictions (May 22, 1987).

[38] Industry Analysis Div., FCC, Trends in Telephone Service, p. 23 (May 16, 1996).

principles, to the interconnection the BOC provides its own enhanced service operations.[39] At the same time, ONA requires the BOC to meet requests from unaffiliated ESPs for technically and economically feasible, unbundled basic service elements and arrangements, whether or not the BOC's own ESP wants to use those same basic service elements and arrangements.[40] Moreover, the FCC has safeguards to ensure nondiscriminatory disclosure of network information and nondiscriminatory provisioning, maintenance, and repair of network services. When extended to include interLATA providers, appropriate *Computer III* and *ONA* requirements, in combination with the 1996 Act's separate affiliate requirements, will be much more than adequate to implement §§272(c)(1) and (e). The FCC has never required both structural separation and nonstructural safeguards for interconnection (i.e. structural separation together with CEI or ONA requirements for information services). Accordingly, the FCC should be selective in extending the appropriate requirements.

Related to this need to be selective, in response to the Commission's request for comments in the ***Revision of Filing Requirements Proceeding***, we and other parties have recommended the elimination of the ONA installation, maintenance, and repair reports and affidavits.[41] We have recommended that other semi-annual and annual ONA reports be consolidated into an annual report. These reports include the ONA services User Guide, a listing of new ONA service requests, and ONA service requests designated for further development. Our recommendations are consistent with the Commission's proposals to eliminate CPE reports.

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[39] *CI-III Phase I Report and Order*, para. 147.

[40] *See Id.* at paras. 210-213.

[41] We have also recommended the consolidation of the ONA services User Guide, a listing of new ONA service requests, and ONA service requests designated for further development into an annual report. *Revision of Filing Requirements*, CC Docket No. 96-23, Comments of Pacific Bell and Nevada Bell, pp. 3-4, April 8, 1996.

In addition, there is no need to extend the nondiscriminatory interconnection requirements of *Computer III* to interLATA telecommunications services. The §272 separate affiliate requirements, combined with the requirement to provide unbundled network elements to requesting telecommunications carriers under §251, would make the addition of ONA and CEI requirements (including the filing of CEI plans) superfluous and unnecessarily burdensome for BOC offerings of interLATA telecommunications services. In addition, not all the ONA and CEI requirements (*e.g.*, the requirement to include new ONA services in the ONA Users Guide and the requirement to file CEI plans) are needed or desirable for interLATA information services, since they, too, are subject to §272 separate affiliate requirements that ensure nondiscrimination. To the extent that the FCC decides that additional safeguards are needed, however, it should extend existing *Computer III* and *ONA* safeguards to interLATA services.

The existing safeguards have the advantage of being well understood and tested. With increased competition, there is less reason than ever for extra layers of new regulations and restrictions. Moreover, the creation of new restrictions would destroy the balance created by Congress between providing protection and encouraging competition, in order to bring new benefits to the public.

CPNI and information. The FCC seeks comment on "whether the separate customer proprietary network information (CPNI) provisions of the 1996 Act affect the requirement to provide information on a nondiscriminatory basis in this section [272]." *NPRM*, para. 76. The CPNI provisions do not affect this section. Congress fully addressed CPNI issues in §222, and the FCC is establishing rules in CC Docket 96-115. Section 222 and these FCC proceedings apply to all telecommunications carriers, because the privacy and competitive concerns about the sharing of personally-identifiable customer information with affiliated

companies and third parties do not relate solely to the BOCs. By contrast, §272(c)(1) deals solely with requirements for the BOCs. Here Congress ensures that the FCC's pre-existing network disclosure safeguards for BOC provision of enhanced services[42] and CPE protect all entities, including those that provide interLATA telecommunications services, interLATA information services, and manufacturing. In this context, "information" refers to information on new network technologies or services that affect the network interface and interconnection. A network disclosure safeguard provides assurance that BOCs will not discriminate in favor of their interLATA or manufacturing affiliates, by requiring BOCs to provide notice of these changes.

No new regulations are needed to implement the §272(c)(1) requirement for BOC nondiscriminatory provision of information. Since new or modified network configurations affecting enhanced services or CPE almost invariably affect interLATA services as well, the existing *Computer III* and *BOC CPE* rules already apply, as a practical matter, to network changes affecting interLATA services. Moreover, the FCC has other existing rules that are not specific to the BOCs but, nonetheless, require the BOCs to inform interLATA carriers and others, in advance, concerning any new or modified network interfaces or services affecting interconnection to their networks. Under the Commission's "All Carrier Rule," all carriers are required to make information necessary for intercarrier interconnection available in a timely manner and on a reasonable basis to "all interested parties."[43] In CC Docket No. 96-98, the Commission has established specific requirements, not set forth in the All Carrier Rule, in order

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[42] *E.g., CI-III Phase I Report and Order*, pp. 1080-1086.

[43] *In re Computer and Business Equipment Manufacturers Association*, 93 FCC 2d 1226, 1228 (1983) (citing Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 84 F.C.C. 2d 50, 82 (1980)) (ordering carriers owning basic transmission facilities to disclose information to "all interested parties on the

to implement the duties imposed by §251(c)(5) on incumbent LECs to "provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities or networks."[44] (emphasis added.)

Procurement procedures. The FCC asks for comments on the procedures and rules needed to implement the §271(c)(1) nondiscriminatory procurement requirements. NPRM, para. 77. Congress established criteria in §273(e)(2). No additional requirements under §272 are needed.

Standards. The FCC asks "what procedures, if any, we should implement to ensure that the BOC does not discriminate between its affiliate and other entities in setting standards." The FCC asks whether, for instance, the BOCs should "be required to participate in standard-setting bodies in the development of standards" covered by §272(c)(1). *NPRM*, para. 78. The necessary rules related to standards are established by a combination of the existing network disclosure rules and the §273 requirements related to manufacturing. No additional requirements are needed. The BOCs voluntarily participate in standards setting bodies, and there is no need to require them to do so.

Sunset of §272(e)(2) and (4) requirements. The FCC seeks comments "on whether Congress intended to sunset the requirements in §§272(e)(2) and (4) if the BOCs eliminated their §272(a) separate affiliates." *NPRM*, para. 80. These sections are explicitly dependent on the existence of separate affiliates. Thus, Congress intended for these requirements

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same terms and conditions insofar as such information affects either intercarrier connection or the manner in which interconnected CPE operates").

to disappear once the affiliates disappear. Congress was very explicit in §272 when it was referring to an affiliate and when to a BOC. Moreover, Congress was very explicit when it wanted safeguards to continue after the affiliate was gone. For the more narrow requirements in paragraphs (1) and (3) of §272(e), Congress ensured that the nondiscrimination provisions continued as to the BOC "itself." By contrast, for the broad requirements in paragraphs (2) and (4), Congress did not do so. These distinctions among separate paragraphs in the same subsection are clearly deliberate. Once BOCs are allowed to integrate, it would not make sense to retain the extremely broad nondiscrimination requirements of paragraphs (2) and (4). In fact, continued application of those paragraphs could make integration virtually meaningless and deny consumers the benefits of more efficient services.

Time period for service intervals. The FCC seeks comments on its tentative conclusion "that §272(e)(1) requires BOCs to treat unaffiliated entities nondiscriminatorily in the provision of exchange services or exchange access in terms of timing, but does not create any additional rights beyond those granted to unaffiliated entities through the 1996 Act, pre-existing provisions of the Communications Act, or other Commission rules." *NPRM*, para. 84. The FCC also seeks comments "on how to implement the phrase 'a period no longer than the period in which it provides such...service to itself or to its affiliates' and whether rules are needed to enforce this requirement," and asks if reporting requirements analogous to those in *Computer III* and *ONA* would be sufficient to implement this provision. *NPRM*, para. 85.

The Commission is correct that this section on "timing" pertains only to timing and does not establish any other rights. The FCC should clarify that the phrase concerning the

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[44] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 , *Second Report and Order and Memorandum Opinion*

period of time relates to an average time interval for provisioning the same type and quantity of service in the same area to carriers and information service providers. There is an obvious need to recognize that individual requests for service vary in their complexity and drain on resources. For instance, the interval would not be the same for a customer ordering one line as for a customer ordering 100 lines, or for a customer in a remote area as for a customer in a densely populated area. The implementation of *Computer III* and *ONA* requirements has recognized these realities, and last year the FCC reported that "nondiscrimination reports...have...not shown any access discrimination by BOCs."[45]

Existing requirements are more than sufficient in this area. In fact, as noted above, we have recommended the elimination of the existing reporting requirements. Clearly, no new requirements are needed.

C. *No Additional Non-Accounting Safeguards Are Necessary To Implement §§272(e)(2)-(4)*

With respect to the nondiscrimination provisions of §§272(e)(2) - (4), the Commission seeks comments on whether there is a need for additional regulations to implement those provisions. *NPRM*, paras. 86-89. There is no need for additional regulations. The language of those provisions is very detailed. Congress included the provisions it found necessary to address the issues raised by the need for a BOC to interconnect with and provide services and facilities to its separate interLATA affiliate as well as to other interLATA carriers. If Congress had intended the Commission to create additional regulations, Congress would have included a provision requiring the Commission to do so.

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and Order, released August 8, 1996, paras. 165-260.

[45] *CI-III Further Remand NPRM*, para. 29.

Furthermore, other provisions of the Communications Act provide any additional support that might be necessary. Sections 201, 202, 251(g), and 272(c) for that matter, all impose additional requirements that address any discrimination concerns.

The Commission seeks comment on the appropriate mechanism for enforcing §272(e)(3) in the absence of tariffed rates. *NPRM*, para. 88. For so long as there is a separate affiliate providing interLATA services, the requirements of §272(b)(5) (*i.e.*, that transactions between the BOC and the separate affiliate be conducted at arm's length, reduced to writing, and subject to public inspection), combined with the biennial audit requirement of §272(d), provide an adequate mechanism for assuring compliance with §272(e)(3). When the separate affiliate requirement sunsets, and BOCs begin to provide interLATA service on an integrated basis, the imputation requirement of §272(e)(3) will continue, and the Commission's accounting safeguards will be adequate to address any concerns. No other rules are necessary.

The Commission seeks comment on whether the term "interLATA or intraLATA services and facilities" in §272(e)(4) would include information services and the facilities used in the delivery of such services. *NPRM*, para. 89. We believe the answer is no. InterLATA services are defined in §3(21) as telecommunications between a point in a LATA and a point outside the LATA. Telecommunications is defined in §3(43) as the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent or received." Information service is defined in §3(20) as the offering of "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications . . . ." Information service uses telecommunications, it is not telecommunications, and therefore is not subject to §272(e)(4).

VI. Marketing Provisions Of §§271 And 272 (¶¶ 90-93)

A. No Additional Regulations Are Necessary To Implement §272(g)(1)

The Commission seeks comment on what regulations, if any, are necessary to implement the requirements of §272(g)(1). *NPRM*, para. 90. As with the nondiscrimination provisions of §272(e), Congress said what it meant. Section 272(g)(1) is essentially another nondiscrimination provision to assure that a BOC does not give an advantage to its interLATA affiliate by permitting the affiliate to market or sell the BOC's services without permitting other interLATA service providers to do the same. The language is clear and does not need further regulation to implement it.

The Commission and other interLATA carriers will be able to monitor the activities of the BOCs and their interLATA affiliates to ensure other interLATA providers are given the same opportunities to sell BOC services. Since marketing and selling are public activities, it will be apparent when an interLATA affiliate is marketing and selling its affiliated BOC's services, and the §272(b)(5) requirements will ensure that others will know what BOC services the interLATA affiliate is marketing and selling and the applicable terms and conditions.

B. Marketing Or Selling InterLATA Services Should Be Broadly Construed.

The Commission is correct in its tentative conclusion that the "market or sell" language of §272(g)(2) and the "jointly market" language of §271(e)(1) are parallel provisions that should be construed similarly. Section 271(e)(1) was placed in the 1996 Act "to provide parity between Bell operating companies and other telecommunications carriers in their ability to offer 'one stop shopping' for telecommunications services."[46] There can be no parity if the comparison is not of

[46] Senate Report on S.652, p. 43.

the same things. To assure the parity desired by Congress, the terms must be construed similarly.

The construction of the phrase "market or sell" should be broad. The Commission listed certain activities (*i.e.*, advertising the availability of interLATA services combined with local exchange services, making those services available from a single source, and providing bundling discounts for the purchase of both services) and asked whether those activities should be included in the definition of market or sell and jointly market. They should, as should any other activity traditionally considered to be marketing or selling. In order to maintain the parity and achieve the pro-competitive objective that Congress desired, once the BOC is authorized to market or sell its affiliate's interLATA services, the BOC should be permitted to engage in any marketing and sales activities engaged in by other service providers. This would include, but would not be limited to, advertising, packaging and bundling, offering promotions, and outbound selling.

Permitting all companies that market and sell interLATA services with local exchange services to engage in the same marketing and sales activities is not only consistent with the language of the 1996 Act and with the desire of Congress to create parity, but is also in the best interest of customers. Without parity in the provision of one stop shopping, customers will be subjected to the inconvenience of not being able to address all of their telecommunications needs with one call to the BOC. The major carriers have made clear their intentions to offer simplified, bundled, one stop shopping (combining local, long distance, and other services). Simplified telecommunications will become the standard market offering. Without parity, and a broad construction of "market and sell", the BOCs will be precluded from simplifying service for customers. For the benefits of competition to take hold, customers must be able to obtain the full